In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1646

ALAN JONES and CRAIG LEE McCRACKEN,
Petitioners,

VERSUS

FARMERS ALLIANCE MUTUAL INSURANCE COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

ELLIOTT C. FENTON and
LARRY D. OTTAWAY
FENTON, FENTON, SMITH, RENEAU & MOON
405 Midland Center —P. O. Box 1638
Oklahoma City, Oklahoma 73101

Attorneys for Respondent,
Farmers Alliance Mutual Insurance Company

June, 1978

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINION BELOW

The opinion of the Court below in *Farmers Alliance Mutual Insurance Company* v. *Jones, et al.*, is now reported at 570 F.2d 1384 (10th Cir. 1978), and is appended to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

A brief clarification of Petitioners' factual statement is required to properly frame the issues presented to this Court. The parties will be referred to as they appeared in the Trial Court.

Plaintiff, Farmers Alliance Mutual Insurance Company (hereinafter Farmers), issued a "General Automobile Liability Policy" to Spann Chevrolet Company which was in effect at all times relevant to this action. The relevant portion of the policy provided:

"PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

* * * * * *

(c) Any other person while using an owned automobile . . . with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use is within the scope of such permission, ..."

On May 20, 1976, a vehicle owned by Spann Chevrolet Company was involved in a one-car accident in Pontotoc County, Oklahoma. At the time of the accident, the vehicle was being driven by E. L. Shippey who died in the collision. Defendants, Melissa Spann, Alan Jones and Craig Lee McCracken were passengers.

This vehicle had been furnished to Wanda Spann, wife of the owner of Spann Chevrolet, several months prior to the accident. Melissa Spann, daughter of the owner of Spann Chevrolet, was occasionally permitted to operate the vehicle under specific instructions not to let third parties (particularly E. L. Shippey) drive.

Defendants, Alan Jones and Craig Lee McCracken, instituted actions against the Estate of E. L. Shippey in State Court for injuries allegedly received in the collision. Farmers Alliance Mutual Insurance Company then initiated

a declaratory judgment action pursuant to 28 U.S.C. § 2201 *et seq.* naming Spann Chevrolet Company, its owner Orval Spann, the Estate of E. L. Shippey and the passengers in the vehicle at the time of the accident as defendants. Jurisdiction was established by diversity of citizenship and requisite amount in controversy under 28 U.S.C. § 1332. After extensive discovery, Farmers filed its Motion for Summary Judgment which was sustained by the Trial Court. Defendants, Jones and McCracken, appealed. The judgment entered by the Trial Court was unanimously affirmed by the United States Tenth Circuit Court of Appeals.

REASONS FOR NOT GRANTING PETITIONERS' WRIT OF CERTIORARI

Petitioners, Jones and McCracken, assert that review should be granted under Rule 19(1)(b) of the Supreme Court Rules which provides review may be granted:

"(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals *on the same matter*; . . . ." [Emphasis ours]

Such is not the case herein.

The Federal Declaratory Judgment Act, like its Oklahoma counterpart, is a *procedural* remedy. *Stamicarbon N. V.* v. *Chemical Const. Corp.*, 335 F.Supp. 228 (D.C. Del. 1973). Where federal jurisdictional requirements are present (in this case by reason of diversity of citizenship), the exercise of jurisdiction under the Federal Declaratory Judgment Act is discretionary. *Duggins* v. *Hunt*, 323 F.2d

746 (10th Cir. 1963). The exercise of that discretion in cases requesting a declaration of coverage under a policy of liability insurance has been repeatedly affirmed by the United States Court of Appeals, Tenth Circuit. *State Farm Mutual Auto Ins. Co.* v. *Mid-Continent Casualty Co.*, 518 F.2d 292 (10th Cir. 1975); *Allstate Insurance Co.* v. *Hiseley*, 465 F.2d 1243 (10th Cir. 1972).

Petitioners rely upon *Allstate Insurance Company* v. *Charneski*, 286 F.2d 238 (7th Cir. 1960), to support their contention that 12 O.S., § 1651, an Oklahoma Statute prohibiting declaratory actions in State Courts on policies of liability insurance, effectively precludes determination of such cases filed pursuant to 28 U.S.C. § 2201 *et seq.* in Federal Courts sitting in Oklahoma because: (1) The State Statute is substantive in nature and thereby controls under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938); and (2) Any exercise of discretion under the Federal Declaratory Judgment Act would be improper in light of the Oklahoma Statute which precludes such declaratory actions in State Courts.

Oklahoma has not adopted by the passage of 12 O.S. § 1651 a policy against deciding coverage questions. It has merely restricted the *procedural* remedy available in *State* Courts thereby requiring determination of those issues in post-judgment garnishment actions. It cannot be successfully contended that the Oklahoma Legislature can similarly restrict the jurisdiction of United States District Courts where federal jurisdictional requirements are present. The *substantive* question (the status of E. L. Shippey

under the Farmers' policy) was decided under applicable Oklahoma law in favor of Farmers.

Allstate v. *Charneski*, supra, arises out of Wisconsin. That State permits direct actions against carriers. Thus, coverage and liability issues are determined in one action. Any discretionary exercise of jurisdiction under the Federal Declaratory Judgment Act would, therefore, necessitate two trials in place of one.

This is not the situation in Oklahoma since direct actions against carriers are not permitted in this State. Coverage questions must, therefore, be determined in separate suits. Thus, the determination of coverage questions under the Federal Declaratory Judgment Act has been held a proper exercise of discretion in this jurisdiction. *Western Casualty and Surety Co.* v. *Teel*, 391 F.2d 765 (10th Cir. 1968).

The case relied upon by Petitioners is not, therefore, "a decision which conflicts with the decision of another Court of Appeals *on the same matter*" as required by Rule 19(1)(b) of the United States Supreme Court Rules and is not grounds for review by this Court on a Petition for Writ of Certiorari.

Petitioners rely upon *Fireman's Fund Insurance Company* v. *Dunlap*, 317 F.2d 443 (4th Cir. 1963), to support their contention that the insured (in this case Spann Chevrolet Company, an Oklahoma corporation) should be realigned as a party plaintiff thereby defeating diversity of citizenship.

In that case, the injured plaintiff asserted in the pending liability action that the driver was operating the vehicle with the permission of the named insured. The named insured filed a cross-claim for declaratory relief as to non-liability in response to that contention.

Neither situation exists in this action. Defendant Spann Chevrolet Company claimed coverage in its answer to Farmers' declaratory judgment action. The insured need not be adverse to its insurer of every point. If any point of controversy exists, realignment is inappropriate. *Sutton* v. *English*, 246 U.S. 199, 38 S.Ct. 254 (1968).

Till v. *Hartford Accident & Indemnity Co.*, 124 F.2d 405 (10th Cir. 1941), a case arising out of Oklahoma and involving facts identical to this action, addressed the realignment issues as follows:

"The appellants assert that Small should be arraigned as a party plaintiff; that when she is so arraigned diversity of citizenship does not exist; and that the trial court was without jurisdiction. . . .

* * * * * *

"Here Hartford and Small were mutually interested in obtaining a declaratory judgment to the effect that Woodward at the time of the accident was not operating the automobile for and on behalf of Small nor with her consent. . . .

* * * * * *

". . . A declaratory judgment that the accident was not within the coverage of the policy would not relieve Hartford from the duty of defending any actions pending or which might be brought against Small. Thus, it will be seen that there was an actual controversy

between Hartford and Small both as to coverage of Woodward as an insured and the obligation of Hartford to defend any action brought against Small [citation omitted]. *We conclude that Small was properly aligned as a party defendant and that the requisite diversity of citizenship existed.*" [Emphasis ours]

As with Petitioners' previous contention the case relied upon to support their realignment argument involves facts which are different from those present herein. It is, therefore, not "a decision in conflict with a decision of another court *on the same matter*" and is not a reason for review by this Court on Petition for Writ of Certiorari.

Petitioners finally question the entry of summary judgment by the Trial Court and the affirmance of that judgment by the Tenth Circuit Court of Appeals. No Supreme Court rule is cited in support of Petitioners' claim that this decision should be tested by Writ of Certiorari. It is difficult to imagine any persuasive argument in favor of such a review in light of the fact that the Trial Court found the uncontroverted facts supported judgment for Farmers as a matter of law and that decision was unanimously affirmed by a panel of Judges from the United States Tenth Circuit Court of Appeals.

CONCLUSION

The Petition for Writ of Certiorari should be denied. Petitioners' contention that the decision rendered in this case is in conflict with decisions rendered "on the same matter" in other circuits is without merit. The cases relied upon by Petitioners in support of that claim involve different legal and factual considerations when compared to the instant controversy. The law as it relates to this case is well settled by previous decisions of the United States Tenth Circuit Court of Appeals. Petitioners should not be permitted to further test the propriety of summary judgment. Their evidence was presented to the Trial Court and found lacking as a matter of law. The decision of the Trial Court was tested on appeal and unanimously affirmed. No further review should be permitted.

Respectfully submitted,

ELLIOTT C. FENTON and
LARRY D. OTTAWAY
FENTON, FENTON, SMITH, RENEAU & MOON
405 Midland Center —P. O. Box 1638
Oklahoma City, Oklahoma 73101

Attorneys for Respondent,
Farmers Alliance Mutual Insurance Company

June, 1978

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT, was mailed on this 13th day of June, 1978, by depositing same in the United States Mails, postage prepaid, to:

Thomas G. Smith
P. O. Box 146
Purcell, Oklahoma 73080
Attorney for Petitioners

Charles B. Grethen
Attorney-at-Law
P. O. Drawer D
Purcell, Oklahoma 73080

Larry D. Ottaway